APR 25 PAGE 10

Supreme Court, U.S.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-914

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-914

MARLIN JOHNSON, ET AL., PETITIONERS

v.

IBERIA HAMPTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

In the reply memorandum filed on behalf of petitioners in this case (Mem. 4-5 n.6), we brought to the Court's attention a supplemental order issued by the court of appeals on December 12, 1979, in which it, *inter alia*, appeared to suggest that the United States, although not a party to the case, would be liable for attorneys' fees assessed in favor of the appellants and against the federal appellees (petitioners here). We also noted that the United States had petitioned for rehearing on that issue and that all of the appellees had petitioned for rehearing en banc on the question whether appellants could be considered "prevailing parties" within the meaning of 42 U.S.C. 1988.

On April 15, 1980, the court of appeals issued an order amending its order of December 12, 1979, to delete the language suggesting that the United States would be required to pay the attorneys' fees assessed against the

federal appellees and denying all petitions for rehearing en banc. The order of April 15, 1980, was accompanied by a concurring opinion of Judge Pell expressing the view that the appellants are not "prevailing parties" within the meaning of 42 U.S.C. 1988 and thus are not entitled to an award of interim attorneys' fees. Judge Pell "reluctantly conclude[d] that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question" (App., *infra*, 5a).

This order of the court of appeals, including Judge Pell's concurrence, is reproduced as an appendix to this memorandum.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

IBERIA HAMPTON, et al.,
Plaintiffs-Appellants,

Nos. 77-1698, et al. vs.

EDWARD HANRAHAN, et al.,
Defendants-Appellees.

On Petitions for Rehearing.

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorney fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

Pursuant to 42 U.S.C. § 1988, and citing as case authority *Davis v. Murphy*, 487 F. 2d 362 (7th Cir. 1978), the majority opinion in this case granted the request of the appellants for attorneys' fees for their appellate work. 600 F. 2d at 643. In my dissenting opinion, I implicitly agreed that the appellants were entitled to fees for their appellate work but would have only allowed the fees commensurate with the work involving the shooter defendants. 600 F. 2d at 666. My treatment of the matter of fees came at the end of a lengthy dissent and was included in a catchall section dealing with "Other contentions and issues." I now am of the belief that my position was incorrect and that the appellants are not "prevailing" parties within the meaning of section 1988. It is true that they have prevailed thus far in the sense of

keeping the litigation alive, but that is the only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated.

Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.

The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows.

> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal.

The second reference in the original brief appears at page 181 of the brief, a section devoted to the federal defendants, and reads as follows:

> And finally, costs for the trial and the appeal, and attorneys' fees* should be assessed against these Defendants.
>
> **Donahue v. Staunton*, 471 F. 2d 475 (7th Cir. 1972); *Stolberg v. Members of Board of Trustees*, 474 F. 2d 485 (1st Cir. 1973); Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976.

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the defendants. The issue, however, was addressed at some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have

a further opportunity of briefing a response. In their reply brief these plaintiffs while conceding that they "may not technically be 'prevailing parties'," contended that an award of attorneys' fees would be consistent with the policy, spirit, and congressional intent underlying section 1988. In addition, the appellants cited a number of cases as reflecting a growing body of precedent supporting the interim award of attorneys' fees.

The propriety of granting fees for appellate work in a situation such as the present where the claiming party had not yet prevailed on the merits was put in sharp focus by the federal defendants' petition for rehearing and suggestion for rehearing in banc in which this was one of only two issues raised. Specifically, these defendants contended that the cases on which the majority had relied were cases which disposed of the merits and that the principal case actually treating the issue, which was in the D.C. Circuit, had reached a contrary result. I agree with Judge Bazelon's analysis.

By an evenly divided vote, this court denied rehearing in banc which, as I see it, settled the issue insofar as this court was concerned, as the issue was squarely presented in the petition for rehearing. The petitions for rehearing presently pending before this court are in essence asking for reconsideration of an issue which has already been the subject of disposition. I do not read these petitions as essentially challenging the amount of the attorneys' fees but rather the propriety of any fees at all.

I am not unmindful that I joined in the order of this court of December 12, 1979, in which it was indicated that the court deemed that the plaintiffs had shown substantial success on the merits on appeal and that they were prevailing parties under section 1988. Upon further research and reflection, I am convinced that I was legally

incorrect in thinking that there was a basis for the award of any fees at this time.

Notwithstanding this "confession of error" on my part, I cannot be unmindful that procedurally this court by denying in banc rehearing has rejected the position which I now believe to be correct and I have no reason for believing that the three judges who voted against the rehearing in banc did not give full consideration to the propriety issue which was set forth in the petition for rehearing and is now being readvanced. The issue is one which has been raised by the defendants in their petitions for certiorari before the Supreme Court. I reluctantly conclude that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question.

I therefore concur in the foregoing order, albeit reluctantly.